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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES M. MOORE, Plaintiff and Appellant, v. CALIFORNIA SURETY INVESTIGATIONS, INC., et al., Defendants and Respondents.	D055253 (Super. Ct. No. 37-2008-00078505-CU-OE-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

Plaintiff James Moore injured his back while working as an investigator for defendants California Surety Investigations, Inc. (CSI) and Two Jinn, Inc. (TJ) (together Employer). On August 17, 2007, Moore filed a grievance against Employer alleging his supervisor had spread rumors in the workplace that defamed Moore and, as a result of these defamations, Moore's requests for a "light duty" or modified position to accommodate his physical limitations had been ignored.

Moore subsequently filed this action alleging numerous claims against Employer. On appeal, however, Moore challenges the judgment as to only two of those claims: a disability discrimination claim based on Employer's alleged failure to provide Moore with reasonable accommodations; and a claim alleging Employer failed to engage in the interactive process as required by Government Code[1] section 12940, subdivision (n). Moore also challenges the award of attorney fees and costs ordered as a sanction under Code of Civil Procedure section 2033.420.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

The Parties

TJ is in the business of writing bail bonds under the trade name Aladdin Bail Bonds. CSI, a subsidiary of TJ, is in the business of apprehending bail fugitives. CSI has offices statewide and employs investigators (colloquially known as bounty hunters) to assist in finding bail fugitives. The parties stipulated Moore worked for both CSI and TJ as a bounty hunter.

The Injury and Pre-Grievance Actions

Moore began working as a bounty hunter for CSI in December 2005. Nine months later, while performing surveillance for an ongoing investigation, he injured his back while reaching for paperwork in his car. Two weeks later, Moore called Mr. Baker

1 All further statutory references are to the Government Code unless otherwise specified.

(then the Southern California regional manager for CSI) and told Baker that Moore's doctor would never release Moore to full duty and that "my bounty hunting days are over." Moore also told Sherry Tipps, the human resources director for Employer, that Moore's doctor had stated Moore's bounty hunting days were over.

After Moore's injury and prior to August 2007, Employer tried to find a position within CSI or TJ that Moore would be willing to accept and would be able to perform. Those efforts were not successful.[2]

On January 11, 2007, Moore told Tipps that an orthopedic surgeon stated Moore needed back surgery, scheduled for March 6, 2007, and he would be off for two months to recover afterward. One month after Moore's surgery, a nurse contacted Employer to provide a medical update on Moore. The nurse stated Moore would be out another six weeks and was scheduled for reevaluation on May 4, 2007, at which time the doctor would have a better idea of when Moore could return to work.

Moore's orthopedist, Dr. Ahmed, first evaluated Moore on April 16, 2007. Dr. Ahmed's April 2007 report rated Moore as temporarily totally disabled. In his subsequent May 2007 report, Dr. Ahmed stated Moore was "getting increasingly worse" and again rated him as temporarily totally disabled. Dr. Ahmed's subsequent July 2007 report again stated Moore's symptoms were worsening, and again rated Moore as

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[2] In this appeal, Moore limits his arguments to alleged errors by the trial court in rejecting his claims for "reasonable accommodation" and "failure to engage in the interactive process" based on Employer's acts and omissions commencing on August 17, 2007. Accordingly, insofar as his claim for "reasonable accommodation" and "failure to engage in the interactive process" was premised on Employer's acts and omissions prior to August 17, 2007, he has abandoned any claim of error as to the judgment against him on those claims.

temporarily totally disabled. Dr. Ahmed's August 10, 2007, report again noted Moore still had severe pain in his right leg, continuous back pain, and weakness and numbness in his right leg; and he testified at trial that Moore was unable to perform the regular work of a bounty hunter.

The August 17 Grievance and Subsequent Rerating

On August 17, 2007, Moore filed a grievance with Tipps alleging that Moore's supervisor, Mr. Simmons, had spread false rumors about Moore engaging in inappropriate sexual misconduct. Moore claimed these rumors were the reason he was not "allowed to return to light duty" and the rumors "prevented [Moore's] transfer to a bail-writing position in either the [Murrieta] or Vista office." However, Moore admitted that, between the time of his surgery and the time of his grievance, he had not asked Employer to place him in a "light duty" position.

On August 30, 2007, Moore asked Dr. Ahmed to write a note for him to provide to Tipps stating that Moore could perform restricted duty. Dr. Ahmed complied and wrote a note changing Moore's status from temporarily totally disabled to temporarily partially disabled. The note stated Moore could not sit, stand or be in the same position for more than 45 minutes without changing positions. Dr. Ahmed also believed Moore could not engage in any bending or stooping and could not perform the job functions of his former position as a bounty hunter.

Employer Response

Around August 27, Tipps (in response to learning from Moore that he had been released to "light duty") contacted TJ's Southern California regional managers Henderson

and Vanderpool about potential placement of Moore into one of their offices as a bail agent, and suggested Moore had expressed interest in "writing bail" in the Riverside, Murrieta or Vista offices. Tipps asked them to look at Moore's application and to contact Moore.

Vanderpool told Tipps that the Riverside office had no positions available. Henderson told Tipps there was a position open in Indio (for a bail agent trainee) and in Los Angeles (for a posting agent), and Henderson contacted Moore about those positions. However, Moore rejected those positions because they were too far away and he was not interested in them.

Thereafter, Tipps spoke with Moore on September 6, 2007, and asked whether Moore would be interested in any job openings available at Employer's corporate headquarters in Carlsbad, California. Moore told Tipps that he needed to make as much as he had made as a bounty hunter and, because he had a bail license,[3] he would prefer a bail bond position. Tipps promised to watch for job openings of that description in the Riverside, Murrieta or Vista offices.

The Involvement of Legal Counsel

After receiving Moore's grievance, Employer retained outside counsel (Ms. Nation) to provide assistance to Employer in connection with Moore's grievance. On September 6, 2007, Nation spoke to Moore. Moore told Nation that, rather than speaking to her about the substantive facts of his grievance, he wanted to have his

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3 Unbeknownst to Tipps, Moore's bail license had expired, and Moore admitted at trial that his license had expired and he had made no effort to renew it because of financial considerations.

attorney (Mr. Magarian) speak with her. Nation then contacted Magarian and left a voice message, and followed with a September 10, 2007, letter confirming that Moore wanted to have Magarian speak directly with Nation about his grievance, Nation had unsuccessfully tried to reach Magarian, and it would be mutually beneficial for Moore and Nation to meet in the near future. Magarian replied by a September 14, 2007, letter stating he would make himself available to talk with Nation after September 18, 2007.

Magarian, who finally called Nation on October 3, 2007, characterized their communications as "settlement" talks. Magarian also sent Nation an October 3, 2007, e-mail with Moore's draft complaint alleging (among other things) that Moore had been wrongfully terminated and seeking various types of damages. The complaint did not contain any demand that Moore be reinstated, or that Employer either provide Moore with a modified investigator position or with a light duty position, and it did not allege any failure to engage in the interactive process. On October 10, 2007, Magarian again wrote to Nation asking her to advise Magarian of Employer's "settlement position" within two days. Nation promised a response by mid-week.

Nation responded on October 17, 2007, and, consistent with Magarian's wish to keep the discussions as settlement talks, referred to her correspondence as "James Moore/CSI—[Evidence Code] Section 1152 Correspondence." Nation's response contained a substantive evaluation of the claims outlined in Moore's draft complaint, and stated Employer is "not interested in paying any sum to [Moore]."

B. The Lawsuit and Judgment

There were no further communications between Moore and Employer until Moore served his complaint for damages. Shortly before filing his complaint, Moore lodged a complaint with the California Department of Fair Employment and Housing against Employer alleging that, on or around October 6 or 7, 2007, and most recently on October 17, 2007, Moore was "fired," "harassed," "denied employment," "denied transfer," and "denied accommodation" because of his sex and his disability. Moore requested and was issued an immediate "right to sue" notice by the Department. Less than three weeks later, Moore filed the present action.

Moore's complaint largely reiterated the allegations of the draft complaint, and pleaded claims for sexual harassment/hostile working environment, disability discrimination, retaliation in violation of Labor Code section 132a, and various claims sounding in wrongful termination. In December 2008 the parties stipulated Moore could file an amended complaint alleging (for the first time) a claim under Government Code section 12940, subdivision (n), alleging Employer failed to engage in the interactive process.

After a court trial, the court ruled against Moore on all of his claims and issued a statement of decision articulating the factual and legal basis for the judgment. Because Moore challenges the judgment only insofar as it denied his claims for damages arising from Employer's purported failure to provide Moore with "reasonable accommodations" and Employer's purported "failure to engage in the interactive process," we limit our review of the statement of decision to those claims.

The court found that, prior to Moore's surgery, Employer acted reasonably to attempt to accommodate Moore by seeking to find a light duty position for him and that Moore thereafter became temporarily totally disabled as a result of the surgery. The court further found that, because Moore had informed Employer that his "bounty hunting days are over," Employer had no reason to believe Moore could (or even wanted to) resume that work, and Moore never initiated the "interactive process" nor suggested any alternatives to Employer. Moreover, the court found that, after Moore notified Employer that he could return to some form of work "with restrictions," Employer searched for a light duty position and located a "bail agent" position in Indio and a "posting agent" position in Los Angeles, but Moore rejected those positions because they were too far away. The court also found that Moore rejected another position in Carlsbad, California because it was not sufficiently remunerative and he could make more money by continuing to receive workers' compensation payments.

The court further found that, after Moore turned the negotiations over to his attorney, there was no communication from Moore that he either wanted to return to work with accommodations or that he was interested in pursuing the interactive process. Instead, after Employer's attorney reviewed the draft complaint and informed Moore's attorney that Employer had no interest in paying Moore to settle his claims, there were no communications between Moore and Employer until Moore served his complaint. The court found that, because Moore's draft complaint (given to Employer on October 3, 2007) affirmatively alleged that Moore had been terminated, and there was no other communication from Moore suggesting he wished to return to work or to engage in the

interactive process, any alleged failure by Employer to either offer reasonable accommodations or to engage in the interactive process was attributable to the actions of Moore or his attorney, which led Employer to reasonably believe Moore had withdrawn from the interactive process and was seeking to pursue damages rather than reinstatement.[4] The court also found that, even if Moore had requested a reasonable accommodation in the form of a "modified" investigator position, an inherent and indispensable qualification for that job is a level of physical fitness that would permit the investigator to handle actual or potential physical confrontations, and there was no viable way to modify the investigator position to accommodate Moore's physical limitations.

After the court entered judgment in Employer's favor, Employer moved for an award of attorney fees based, in part, on Code of Civil Procedure section 2033.420. The court found Moore had unreasonably failed to admit the truth of four specific requests for admissions propounded by Employer during discovery, and Employer was entitled to recover the fees attributable to proving the truth of the matters contained in those requests. The court awarded Employer $7,741.48 as attorney fees under Code of Civil Procedure section 2033.420.

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[4] The court also rejected Moore's motion, apparently made on the first day of trial and over defense objection, to amend his complaint to interpose a claim for injunctive relief to compel Employer to engage in the interactive process seeking to reasonably accommodate Moore's disabilities. The court concluded this amendment would prejudice the defense by transforming Moore's action from a wrongful termination action to an injunctive action, and denied the request.

II

GOVERNING LEGAL PRINCIPLES

A. Reasonable Accommodations and the Interactive Process

Reasonable Accommodation

The California Fair Employment and Housing Act (FEHA) (§ 12900 et seq.) makes it an unlawful employment practice to discharge a person from employment or discriminate against the person in the terms, conditions, or privileges of employment, because of physical disability or medical condition. (§ 12940, subd. (a).) However, FEHA does not require the employer to employ an employee "where the employee, because of his or her physical . . . disability, is unable to perform his or her essential duties even with reasonable accommodations . . . ." (§ 12940, subd. (a)(1).)

FEHA imposes on the employer the obligation to make reasonable accommodation: "It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] . . . [¶] (m) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical . . . disability of an . . . employee." (§ 12940, subd. (m).) However, an employer is not required to make an accommodation "that is demonstrated by the employer or other covered entity to produce undue hardship to its operation." (*Ibid*.)

The elements of a claim alleging an employer breached its duty to provide the employee with a reasonable accommodation are (1) the employee had a disability under

FEHA, (2) the employee is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the employee's disability. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1009-1010.) The term "reasonable accommodation . . . [means] 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired' " (*id*. at p. 994), and can include job restructuring, part-time or modified work schedules, or reassignment to a vacant position. (Cal. Code Regs., tit. 2, § 7293.9, subd. (a).)

The Interactive Process

FEHA also makes it unlawful for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or . . . medical condition." (§ 12940, subd. (n).) The obligations imposed by section 12940, subdivision (n), have been described as separate from the duty imposed on the employer to make reasonable accommodations, and involve proof of different facts. (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424.) The purpose of the interactive process is to determine whether an accommodation is required and can be provided (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464), and "is the primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working without placing an 'undue burden' on employers." (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 261-262.)

As explained by the court in *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 62, footnote 22:

> "Typically, an applicant or employee triggers the employer's obligation to participate in the interactive process by requesting an accommodation. [Citation.] Although it is the employee's burden to initiate the process, no magic words are necessary, and the obligation arises once the employer becomes aware of the need to consider an accommodation. Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith."

Where, as here, the parties have commenced and pursued litigation, the employee's burden of proof on a section 12940, subdivision (n), claim requires proof that (1) the employee initiated the interactive process, (2) the employer failed to participate in good faith efforts to help the employee identify a specific and available reasonable accommodation, and (3) the employee was damaged by the employer's failure because there was in fact an objectively available reasonable accommodation that would have been identified and offered during the interactive process. (*Scotch v. Art Institute of California, supra,* 173 Cal.App.4th at pp. 1018-1019.)

B. Standards of Review

When an employee challenges a judgment after trial that denied recovery for claims asserted under section 12940, subdivisions (m) and (n), we are ordinarily limited to evaluating whether substantial evidence supports the judgment in favor of the employer. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) Under this

standard, our power " ' "*begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the [verdict]." [Citations.]' [Citation.] We must 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. . . .' " (*Ibid*.) Our standard of review for Moore's challenge to the award of attorney fees under Code of Civil Procedure section 2033.420 is similarly deferential, and we may reverse only if we conclude the award was an abuse of discretion.

C. Substantial Evidence Supports the Judgment on Moore's Reasonable Accommodation Claim

The evidence supports the trial court's conclusions that, during the relevant time frame, Employer reasonably understood that Moore was not seeking to return to his former position of a "bounty hunter" but was instead seeking a "light duty" position that was *both* geographically proximate to his home *and* had a sufficiently high level of pay to warrant his return to work. Additionally, there was substantial evidence that Employer tried to accommodate Moore's request for a light duty job by offering him three different positions, but Moore rejected those positions because of the distance or remuneration associated with the proffered positions. Finally, there was substantial evidence that Employer had no available job vacancy during the relevant time period that fit Moore's physical, geographic and pay limitations. The reasonableness of an accommodation is ordinarily a factual question and, where the employer has offered multiple alternative positions to the employee that accommodated the employee's disability, the employee's

claim that the employer failed to satisfy its statutory obligations to reasonably accommodate the employee's disability is properly rejected.[5] (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228-229.)

Moore's argument appears to be that two aspects of the evidence at trial show, as a matter of law, Employer violated its obligations of proffering reasonable accommodations after learning Moore was available for (and was seeking) a light duty position. First, Moore cites the testimony of Mr. Martines, President of CSI, who testified he would not employ Moore as a bounty hunter until Moore was "100 [percent] better." Moore, relying on *Gelfo v. Lockheed Martin Corp., supra,* 140 Cal.App.4th at page 49, footnote 11, argues this was a per se violation of the requirement that an employer must seek to accommodate an employee's disability.

Mr. Martines's testimony, read as a whole, was that he did not believe the bounty hunter position could be modified to accommodate the physical limitations associated with Moore's injuries, and therefore Employer could not employ Moore in his former position until Moore was physically healed and capable of handling all of the demands of the position.[6] Although *Gelfo v. Lockheed Martin Corp., supra,* 140 Cal.App.4th at page

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5 Moore cites no evidence showing (and apparently did not claim at trial) the proffered positions did not constitute a reasonable accommodation of Moore's physical, geographic and pay limitations.

6 There was ample evidence, and the court found, that the essential functions of the work of a bounty hunter encompassed the capacity to engage in strenuous physical activities, and requiring Moore to be completely able to handle these essential physical functions was not unreasonable. (See, e.g., *Quinn City of Los Angeles* (2000) 84 Cal.App.4th 472, 484 ["given the public safety concerns involved with the day-to-day work of a patrol officer (the position for which plaintiff applied), LAPD's requirement

49 did state (in dicta) that a "policy requiring an employee to be '100 percent healed' before returning to work is a per se violation" of FEHA (*Gelfo*, at p. 49, fn. 11), *Gelfo* cited and relied on *McGregor v. National R.R. Passenger Corp.* (9th Cir. 1999) 187 F.3d 1113 for that rule. However, *McGregor* actually stated a *policy* that requires the employee to be 100 percent healed before returning to work *or bidding on another job* can be a per se violation. (*Id*. at p. 1116.) The undisputed evidence was that Employer did not have that *policy*, because Moore was *actually* offered three other positions at a time when he was not fully healed.

Moore's second argument is that the evidence showed there was a "light duty" position available in the Riverside office in October 2007 (the office at which he sought to work) offered to another injured employee but not to Moore. Relying on *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950-951, Moore asserts that Employer had an affirmative duty to inform Moore of this suitable job opportunity and to determine whether Moore was interested in and qualified for that position, and Employer's failure to offer the Riverside position to him required judgment in Moore's favor on his "reasonable accommodation" claim. We are unpersuaded by this argument.[7] *Prilliman* stated only

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that an applicant possess a certain level of [fitness] appears eminently reasonable"].) Moore in effect concedes the evidence supported the trial court's judgment that "[t]he job of a bounty hunter is exceptionally dangerous and . . . is different from a job where accommodations can be made to avoid physically taxing situations," as well as the conclusion Moore "could not perform all of the essential functions of a bounty hunter including, in the words of [Moore], 'subduing uncooperative fugitives.' "

[7] This evidence appears to undermine Moore's claim under *Gelfo v. Lockheed Martin Corp., supra*, that Employer committed a per se violation of section 12940, subdivision (m), by enforcing a *policy* of denying reasonable accommodations to injured

that, when an employer is aware an employee has a disability, the employer "has an affirmative duty to make known to the employee other *suitable* job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees." (*Prilliman v. United Air Lines, Inc., supra,* 53 Cal.App.4th at pp. 950-951.) Moore peremptorily asserts the Riverside position was a "suitable" position for which he was qualified and would have been interested, and therefore Employer should have offered him that opening, but the evidence viewed most favorably to the judgment does not compel those conclusions.[8] First, the court concluded Moore withdrew from the interactive process and asserted he had been terminated before that position was even available. More importantly, there was some evidence that the "light duty" position was not a suitable position for which Moore would have been interested: it involved different duties and was initially provided

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employees. Moreover, even assuming the other employees to whom the position was offered *were* similarly situated to Moore (a factual question apparently resolved adversely to Moore) this evidence showed at most that Moore was subjected to *disparate treatment*, which is a claim under section 12940, subdivision (a), involving different facts and burdens of proof. (See, e.g., *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246.) Moore's claims of discriminatory treatment were rejected at trial, he has abandoned any claim of error as to those determinations, and we reject Moore's effort to indirectly resurrect his claim of disparate treatment under the rubric of his section 12940, subdivision (m), claim.

8 We question whether Moore may even raise issues concerning whether substantial evidence supports the findings, because Moore has made no effort on appeal to state all of the facts most favorably to the judgment, which permits us to deem this claim forfeited. (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658-1659.)

as a "light duty" position to a person who was *not* a bounty hunter; and it was thereafter eliminated as a position and its functions were transferred to an existing employee. Because there is evidence supporting the conclusion there was not a suitable position, the evidence regarding the Riverside position does not support Moore's claim that Employer failed as a matter of law to reasonably accommodate Moore's disability.

We conclude substantial evidence supported the conclusion that Employer offered positions to Moore that represented reasonable accommodations of his disability within the constraints imposed by Moore, and that neither *Gelfo* nor *Prilliman* provide support for Moore's argument that as a matter of law Employer violated its duty to reasonably accommodate his disability. Substantial evidence supports the judgment in Employer's favor on Moore's claim for violation of section 12940, subdivision (m).

D. Substantial Evidence Supports the Judgment on Moore's Interactive Process Claim

Moore does not contest the trial court's conclusion that, prior to August 17, 2007, Employer did not violate any obligations regarding the "interactive process." Instead, Moore argues that after his physician released him for "restricted" duty in late August 2007 and Employer learned Moore was available to return to work subject to the medical limitations, Employer had an obligation to engage in the interactive process that continued through and including trial.

There is substantial evidence that, after Moore stated he wanted some form of renewed employment, Employer affirmatively investigated whether other positions would be available that could fit within the limits set by Moore's physical condition and

his stated geographic and monetary requirements, and in fact offered Moore options he rejected. There was also substantial evidence that, even after Moore rejected these reasonable accommodations, Employer promised to continue looking for a position that would fit the conditions Moore had demanded. However, Moore did not further contact Employer after September 6 to ask whether there were any available positions that would accommodate his demands.

Moore argues the trial court erred in finding that, after he rejected the three offered positions, he withdrew from or abandoned the interactive process. However, the evidence showed that after Moore rejected the proffered positions, he ceased all further direct communications concerning a potential return to employment, and on September 6, 2007, directed that all further communications be channeled through his attorney. Thereafter, Moore's attorney expressed no inclination to engage in the interactive process. Instead, the only communications from Moore's attorney (apart from a brief September 14 letter confirming Moore had retained the attorney) was (1) an October 3 phone conversation to discuss settlement of the litigation embodied in a draft complaint sent by Moore's attorney to Employer's attorney that same day, and (2) an October 10 e-mail from Moore's attorney requiring a response within two days. Because a trier of fact could conclude there was nothing in the October 3 phone conversation, or in the draft complaint sent on October 3, or in the October 10 e-mail, that suggested Moore was asking Employer to engage in the interactive process to identify a position that would accommodate Moore's physical disability, a trier of fact could conclude Employer had no

reason to believe Moore was attempting to trigger or further pursue the interactive process, and could reasonably believe Moore had abandoned the interactive process.[9]

It is the employee's burden to trigger the interactive process by informing the employer that an accommodation is needed and desired (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1384), and once that process is triggered, both parties must proceed in good faith to keep the lines of communication open and to exchange information seeking the requested accommodation. (*Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at pp. 265-266.) When an employee sues the employer alleging violation of the interactive process, the court will "look at the facts with regard to whether the breakdown in the informal, interactive process was due to [the employee or the employer]" (*id* at p. 265) to "isolate the cause of the breakdown and then assign responsibility." (*Beck v. University of Wisconsin Bd. Of Regents* (7th Cir. 1996) 75 F.3d 1130, 1135.) An employer will be liable for violating the interactive process if the trier of fact concludes the employer bore responsibility for the breakdown in the process. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 985.)

Because the trier of fact here concluded Moore was responsible for closing the lines of communication and terminating further pursuit of the interactive process by

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9 Moore asserts there was no evidence to support the trial court's conclusion that Employer, relying on Moore's attorney's demands and proposed lawsuit, reasonably believed Moore had withdrawn from the interactive process. Moore asserts there is no evidence Employer was aware of the actions of Moore's attorney or of his proposed lawsuit, and hence could not have reasonably relied on those facts. Even assuming Moore may raise this argument (but see fn. 8, *ante*), a trier of fact could infer that Employer's counsel complied with her professional obligations by keeping her client apprised of the demands made by Moore's attorney and of Moore's proposed lawsuit.

electing to pursue a damages remedy with no indication that he wished to return to work in some modified position, there is substantial evidence to support the finding that "the breakdown in the informal, interactive process was due to [the employee rather than the employer]" (*Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 265), which supported the judgment in favor of Employer on Moore's section 12940, subdivision (n), claim.

Moore argues the evidence does not support the judgment because Tipps testified Moore was an employee of Employer even after he retained his attorney and filed the litigation. However, whether Employer continued to deem Moore an employee as required by law (see generally Lab. Code, § 132a; *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143) is a distinct question from whether Employer could reasonably believe Moore had abandoned the interactive process. Moore's contention appears to assert that, after an employee (who has suffered a work-related injury and is collecting workers' compensation) expresses a desire to find an alternative position with the employer, the employee has exhausted his or her responsibilities under the interactive process and thereafter may entirely stop communicating with the employer without relieving the employer of the ongoing—and potentially perpetual—obligation to search for alternative positions to offer to the employee. Moore cites no pertinent authority for this argument, and it appears contrary to the cases that have evaluated the obligations on both parties under the interactive process. We conclude substantial evidence supports the trial court's judgment in favor of Employer on Moore's section 12940, subdivision (n), claim.

E. The Award of Sanctions Was Not an Abuse of Discretion

The trial court awarded attorney fees and costs as sanctions against Moore pursuant to Code of Civil Procedure section 2033.420. Employer's motion for those attorney fees and costs asserted, and the trial court found, that Moore unreasonably declined to admit certain requests for admission propounded during discovery. The trial court's award of $7,741.48 represented the costs and fees incurred to prove the facts the trial court determined should have been admitted by Moore. Moore contends the trial court's order was an abuse of discretion.

The Requests for Admissions and Trial Evidence

Employer posited four requests for admissions (RFA's) asking Moore to admit that, from and after the time of his back injury, he "could no longer physically apprehend bail fugitives" without compromising his own health or safety or the health or safety of others. Moore, after interposing several objections to the RFA's, denied the RFA's.[10]

At trial, Employer was required to prove that an essential aspect of the job of a bounty hunter was the capacity to engage in strenuous physical activity, including the

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10 The four RFA's specifically asked Moore to admit that, after his back injury, "[Moore] could no longer physically apprehend bail fugitives without compromising [Moore's] health" (RFA No. 10), "[Moore] could no longer physically apprehend bail fugitives without compromising [Moore's] safety" (RFA No. 11), "[Moore] could no longer physically apprehend bail fugitives without compromising the health of others" (RFA No. 12), and "[Moore] could no longer physically apprehend bail fugitives without compromising the safety of others" (RFA No. 13). Although Moore objected that the phrases "without compromising your health," "without compromising your safety," "without compromising the health of others," and "without compromising the safety of others" were vague and ambiguous, he raised no similar objection to the term "physically apprehend."

capacity to use varying and escalating degrees of physical force to apprehend bail fugitives. Additionally, Employer showed that a bounty hunter must be able to rely on his or her partner to be ready to assist in physically apprehending a fugitive.[11] At trial, Moore admitted that the job of bounty hunter required numerous physical abilities, including apprehending uncooperative fugitives, and that apprehending bail fugitives involved the capacity to employ escalating methods to subdue a fugitive, including "empty hand" control, team takedown and carotid restraint; and to escalate to the use of physical force, including palm/heel strike, common fist elbow strike, use of a flashlight as a weapon, and the use of other significant force to subdue the fugitive.

Finally, Employer was required to show that although Moore's doctor released him for modified work in August 2007, the work for which Moore was released would be limited to activities that would not entail more than 45 minutes of sitting, standing or walking. The doctor testified Moore could not bend or stoop and that Moore did not have the ability to go back to work as a bounty hunter. The doctor explained that, although there were certain aspects of the job Moore could perform, he could not do the physical parts, and although Moore could "probably" effect a "peaceful arrest" of a fugitive, he could not effect an arrest requiring physical force.

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11 Mr. Baker testified that, in addition to the physical exertion when investigators must bend, kneel, crouch, crawl, and other physical actions to find hidden fugitives, every confrontation is ripe with the potential for violence and each investigator is reliant on his or her co-investigator to be ready to assist in physically apprehending a fugitive. Baker had been required to pull people off fences, out from under cars, and out of basements, and had personally been involved in over 30 fights, some of which were "knock-down drag-out fights." Baker also explained why the physical capacity to simply point a gun, fire a taser, or to employ pepper spray would not meet the physical requirements essential to the job of a bounty hunter.

The Sanctions Motion

Employer sought sanctions for Moore's failure to admit that, as a result of his back injury, he could no longer physically apprehend bail fugitives without compromising the health or safety of himself or other investigators. Moore opposed the motion, arguing that he had a reasonable ground for believing he would prevail on the issue because there was evidence that many apprehensions did not involve a "reportable" use of force and Moore's doctor testified he could apprehend a fugitive as long as the apprehension was peaceful. The court rejected Moore's attempt to parse or construe the term "physically apprehend" to mean a peaceful apprehension (e.g. an apprehension requiring no minimal physical exertion by the bounty hunter), and awarded sanctions.

Analysis

An award of fees and costs under section 2033.420, subdivision (b), shall be made unless there was good reason for the opposing party to deny the request for admission. (*Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055, 1065.) We must uphold an order awarding fees and costs absent an abuse of discretion (*id.* at p. 1066), and the statute "clearly vests in the trial judge the authority to determine whether the party propounding the admission thereafter proved the truth of the matter which was denied." (*Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 735.) The trial court could reasonably find the term "physically apprehend bail fugitives" was not ambiguous[12] and

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12 Moore's objections to the RFA's, lodged contemporaneously with his responses, did *not* object that the term "physically apprehend" was vague or ambiguous.

was directed at obtaining Moore's admission that he could not *physically* apprehend bail fugitives rather than whether he could handle the peaceable surrender by a bail fugitive.

Moore asserts that *Miller v. American Greetings Corp.*, *supra*, 161 Cal.App.4th 1055 supports his argument that the award of sanctions should be reversed for an abuse of discretion.[13] However, *Miller* is distinguishable. In *Miller*, the defendant corporation was sued by the plaintiff under respondeat superior principles for injuries resulting when the defendant driver (employed by defendant corporation as an installation supervisor who traveled around the city and used his cell phone to coordinate jobs) struck the plaintiff while driving. The defendant corporation asked the plaintiff to admit that, at the time the defendant driver struck and injured the plaintiff, the defendant driver was not acting "within the course of any employment" of defendant corporation. (*Miller v. American Greetings Corp.*, *supra*, 161 Cal.App.4th at pp. 1058-1059.) The plaintiff denied the RFA, and the trial court awarded sanctions because it concluded the only way to disprove the RFA was to show the employee was on his phone discussing corporate business at the time he struck the plaintiff. (*Id*. at p. 1066.) The *Miller* court reversed because the test applied by the trial court—was the driver actually talking on his cell phone about business at the time of the accident—"was too narrow because . . . the law of

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13 Moore also relies on *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242 to show the order was an abuse of discretion. However, *Laabs* affirmed the trial court's discretionary determination because the appellate court concluded the trial court could have reasonably found that (1) some of the RFA's in *Laabs* were not central to the disposition of the case within the meaning of Code of Civil Procedure section 2033.420, subdivision (b)(2), and (2) the remainder of the RFA's called for legal conclusions and the trial court could have reasonably found plaintiff had a good faith belief that she would prevail on those legal issues at trial. (*Laabs*, at pp. 1276-1277.) Neither criteria has any application to Moore's argument.

respondeat superior is not so cut and dried. . . . Using one's car as a mobile office from which one places and receives work-related calls and conducts an employer's business is a relatively recent, and growing, business practice. . . . Because the law involving 'mobile' offices inside an employee's car is unsettled, [plaintiff] could have reasonably entertained a good faith (albeit ultimately mistaken) belief that they could prevail here under respondeat superior." (*Id*. at p. 1066.) Accordingly, concluded *Miller*, plaintiff had an articulable legal theory on which to deny the RFA.

In contrast, Moore was not asked to admit a contention of law in an unsettled legal milieu. Instead, he was asked to admit that his physical condition—which he affirmatively alleged was sufficiently debilitating to require some form of accommodation—precluded him from physically apprehending bail fugitives. *Miller* has no application here.

DISPOSITION

The judgment is affirmed. Employers are entitled to recover costs on appeal.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.